



POLICE DEPARTMENT CITY OF NEW YORK

July 31, 2017

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Michael Tarulli
Tax Registry No. 929239
23 Precinct
Disciplinary Case No. 2016-16421

Charges and Specifications:

1. Said Police Officer Michael Tarulli, while assigned to the 120th Precinct, while on-duty, on August 16, 2016, having been directed by New York City Police Lieutenant Grigoriy Bardash, Tax # 927780, not to remove a dog from the precinct that belonged to a lodged prisoner, did fail and neglect to comply with said order.

P.G. 203-03, Page 1, Paragraph 2 -COMPLIANCE WITH ORDERS
GENERAL REGULATIONS

Appearances:

For the Department: Jessica Brenes, Esq.
Department Advocate's Office
One Police Plaza
New York, New York 10038

For the Respondent: Michael Martinez, Esq.
Worth, Longworth & London, LLP
111 John Street – Suite 640
New York, New York 10038

Hearing Date (s):

June 20, 2017

Decision:

Not Guilty

Trial Commissioner:

ADCT Nancy R. Ryan

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on June 20, 2017. Respondent, through his counsel, entered a plea of Not Guilty to the subject charge. The Department called Lieutenant Mathew Harrison and Lieutenant Grigoriy Bardash as witnesses. Respondent testified on his own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

After reviewing the evidence presented at the hearing, and assessing the credibility of the witnesses, I find Respondent Not Guilty of the charged misconduct.

FINDINGS AND ANALYSIS

In this case, it is undisputed that on August 16, 2016, Respondent, assigned to the 120 precinct, was working as stationhouse security on a 0705 to 1540 hours tour. His platoon commander was Lieutenant Matthew Harrison. Another supervisor during his tour was Sergeant Lopez. Lieutenant Grigoriy Bardash was the commander for the 3rd platoon that day.

At some point, a dog entered the precinct. Many of the officers, including Respondent, were playing with, and tending to, the dog. Later, a prisoner entered the precinct and claimed the dog belonged to him. The prisoner signed a statement, given to him by Respondent, indicating that he relinquished all ownership rights in the dog since he could no longer care for it. (Resp. Ex. A)

Lieutenant Harrison had a discussion with Respondent about the dog. He and Respondent agree that Respondent asked if he could take the dog and that Lieutenant Harrison had no problem with that plan. Respondent did remove the dog from the precinct.

The area of dispute in this case concerns what, if any, conversation Lieutenant Bardash had with Respondent about the dog. Lieutenant Bardash testified he gave Respondent an order not to remove the dog from the precinct. Respondent did not agree that an order was given.

Lieutenant Harrison testified that he was the day tour platoon commander on August 16, 2016, and that Respondent was one of his subordinates that day. (Tr. 11-12) Between 12:00 and 12:30 that day, Respondent asked him if he could get a signature from a prisoner on a waiver that would permit him to take the dog that was in the stationhouse. Lieutenant Harrison testified that Respondent showed him this waiver and he told Respondent he didn't think it would be a problem. He testified that he continued to think it over after that, but didn't communicate that to Respondent. Lieutenant Harrison resumed patrol. At approximately 1525 hours, he was approached by Lieutenant Bardash. Lieutenant Harrison testified that Lieutenant Bardash told him he had heard about Respondent wanting to take the dog home, but advised Harrison that Respondent couldn't do so because the dog was prisoner property. Lieutenant Harrison explained that he had been thinking about the dog's well-being as a first priority, since he knew it would go to a kill pound, and had not thought of it as prisoner property. He thanked Lieutenant Bardash and took no further action regarding the issue. (Tr. 13-15, 18, 24)

Lieutenant Bardash testified that he was the third platoon commander on August 16, 2016. He had previously supervised Respondent when Respondent was in the third platoon. (Tr. 30) He testified at approximately 1530 hours, after he had finished roll call for the third platoon, he spoke to Respondent in the muster room. He believed that Respondent approached him and informed him right away that he was taking the dog home. Lieutenant Bardash testified that he told Respondent he couldn't do that. Lieutenant Bardash further testified that when Respondent told him he had a waiver from the prisoner who owned the dog, he gave Respondent an example

of how the prisoner could change his mind when he was released from custody and file a complaint against the Police Department. Lieutenant Bardash recalled that he said to Respondent, "so let me get this straight: You went into the cells in full uniform, you gave this man a piece of paper to sign while this man is under duress. So today he said it's okay for you to take the dog home; tomorrow when he gets out of jail ... and realizes that... his only companion is gone and the Police Department took it and he turns around and files a complaint that the Police Department stole his dog, how is that going to look?" Lieutenant Bardash did not recall if he explained to Respondent that the proper procedure was to take the dog to the pound. (Tr. 32-34, 68-69) He testified that he told Respondent several times that he couldn't take the dog home, but Respondent just kept repeating that he had a waiver. (Tr. 34-35) He did not know what Respondent planned to do with the dog. (Tr. 46) Lieutenant Bardash then left the stationhouse and when he returned later in his tour, he realized the dog was no longer in the muster room. He confirmed with the desk officer that the dog had not been taken to the pound. Lieutenant Bardash assumed Respondent had taken the dog, so he called his delegate and instructed him to call Respondent, find out if he had the dog, and, if he did, direct him to bring it back. He was not physically present when the dog was returned to the stationhouse, but learned later that day that it had been returned. (Tr. 35-37)

Lieutenant Bardash testified that he also spoke to Lieutenant Harrison about the dog after his initial conversation with Respondent. He testified he knew that, "Lieutenant Harrison made a wrong call in this matter...." He wanted to let Lieutenant Harrison know that he had given, "a different order to the officer from what he gave to – from the permission that he gave to [Respondent]." He testified that he didn't think Lieutenant Harrison fully understood that the

dog was prisoner property and after he explained the situation, Lieutenant Harrison agreed that he was right. (Tr. 37-39, 50-51)

Lieutenant Bardash acknowledged that he previously had an issue with Respondent when he requested his memo books and did not receive them immediately. (Tr. 40-41) On cross-examination, more of Respondent's prior history with Lieutenant Bardash was explored.

Lieutenant Bardash testified that he did not remember if he called Respondent worthless or told him he should resign in front of other supervisors. (Tr. 42-43) He also agreed that he may have told Respondent's delegate that if he didn't bring the dog back he was going to "fuck him."

Lieutenant Bardash stated that this was a figure of speech and he had previously used similar language even when addressing civilians. (Tr. 57-58) He also confirmed that when he was Respondent's direct supervisor, he split him up from his steady partner because, "they weren't handling the jobs right." (Tr. 60, 65) When asked if he did this less than a week after he took over the command, Lieutenant Bardash stated that he did not remember how long it was. He also testified that during the time he supervised Respondent, he, at times, had him wear a reflective vest, partly so that he could keep an eye on Respondent from a distance. (Tr. 61, 69)

Respondent testified that he had been assigned to the 120 precinct for 13 years until he was transferred to the 23 precinct shortly after this incident. He resides in [REDACTED] (Tr. 71-72) On August 16, 2016, he was on duty, working from 0705 to 1540, assigned to stationhouse security. (Tr. 72-73) When he arrived at work, he noticed a "cute" dog running around. Several officers in the precinct were playing with the dog. Respondent learned that the dog had been found wandering the streets by midnight officers who brought it back to the stationhouse. (Tr. 73-74) Respondent testified that he got the dog some food and water, and explained that since he was assigned to the precinct, he "was kind of unofficially assigned to the dog, too." (Tr. 74)

Respondent was told that the dog had a chip, but that the information from the chip showed that the registered owner no longer lived in the United States. (Tr. 75) Respondent made, "a hell of a lot of phone calls trying to find it a home, someone that would ... hold the dog until I guess the situation was thought out." (Tr. 75) He also, in a process that he described as taking up his whole shift, used social media and spread pictures of the dog around. He testified that he did that because, "generally, we try not to send the dogs to the pound because everybody knows that they never come out." (Tr. 75-76) A co-worker found a family interested in the dog. It was Respondent's understanding that the co-worker told the family they would have to return the dog if anybody claimed it. Respondent decided this was a good place to bring the dog. (Tr. 76-77)

At some point after Respondent learned of this family, a prisoner came into the station in handcuffs, saw the dog, and stated that it belonged to him. The prisoner started crying and said he couldn't believe the police found the dog. Respondent testified that the prisoner told him that he had gotten into an argument with his girlfriend the night before because his neighbors told him the girlfriend was beating the dog. He left his apartment and when he returned the next morning, he realized the dog wasn't there because the girlfriend had thrown it out in the street. He then got into a physical altercation with the girlfriend and was arrested. Respondent further recounted that the prisoner told him he didn't want his girlfriend to abuse the dog and "pretty much begged [Respondent] to take it." (Tr. 77-79) At some point, the girlfriend came to the precinct and asked for the dog, but after she acknowledged that it belonged to the prisoner, Respondent refused to give it to her and she left. (Tr. 90-91)

After this conversation with the prisoner, Respondent approached his supervisor, Sergeant Lopez, who suggested he write a statement for the prisoner to sign. (Tr. 79-80) Respondent took this waiver statement to the prisoner in his cell and he signed it. In the

statement, the prisoner relinquished all rights to and ownership of the dog, indicating he was no longer able to take care of it. (Tr. 80-81, 92, Resp. Ex. A) Respondent testified that he then took the signed statement to his platoon commander, Lieutenant Harrison, and also explained his plan for the dog to him. Respondent asked Lieutenant Harrison if he was okay with the plan and Lieutenant Harrison indicated that he approved. (Tr. 82)

Shortly before Respondent was going to leave the precinct with the dog, he saw Lieutenant Bardash playing with the dog. He testified that he did not initiate any conversation with Lieutenant Bardash. According to Respondent, Lieutenant Bardash said to Respondent, "You know this is a prisoner's property." Respondent acknowledged to Lieutenant Bardash that he was aware and noted that the prisoner had signed a waiver, that Lieutenant Harrison was aware of the situation and that he had located a home for the dog. Respondent further testified that Lieutenant Bardash then said that IAB "[wouldn't] be too happy about this" and walked out. As Lieutenant Bardash was walking out, Respondent stated again that he had a signed waiver and his Lieutenant was aware of it. Respondent testified that Lieutenant Bardash never gave him an order not to take the dog. (Tr. 83, 86)

Respondent left the precinct with the dog and headed towards the home of the family who had agreed to take it. Right before he arrived, he received a call from another officer who told him the Lieutenant was "pissed off" at him and if he didn't bring the dog back right away, the Lieutenant was going to "fuck" him. (Tr. 87) Respondent then picked up his nephew, drove back to the precinct and, to avoid a confrontation with Lieutenant Bardash, had his nephew bring the dog back inside. (Tr. 88) Respondent later learned that the dog was taken to the pound and eventually adopted by another officer from his precinct. (Tr. 88, 97)

Respondent described his relationship with Lieutenant Bardash prior to this incident as, "extremely sour." (Tr. 83) He testified that Lieutenant Bardash had split him up with a partner he had worked with on and off for years, and steadily with for the last two years, within one week of becoming their supervisor. (Tr. 83-84) He further testified that Lieutenant Bardash stated in front of two sergeants that Respondent was worthless and that he should resign or vest out and that he was going to make Respondent's life miserable and make him resign. (Tr. 84) With regard to the safety vest, Respondent testified that he was the only person ordered to wear the vest, which was too small for him, out of the countless people who had the SkyWatch post. He further testified that Lieutenant Bardash joked about it and belittled him in front of rookies. After complaining to his delegate, Respondent, after a couple of days, did not have to wear the vest again. (Tr. 85) Respondent also testified that Lieutenant Bardash had previously given him several command disciplines over the course of a few days. (Tr. 99)

On cross-examination, Respondent recalled being asked at his Department interview whether, even if Lieutenant Bardash had not specifically indicated he was ordering him not to the dog, Bardash had said something to the effect of 'you can't take the dog home because it is prisoner's property.' In response, Respondent told the investigator, "I guess he was trying to explain to me what the right thing to do was, but I told him my lieutenant was okay with it. I have a written statement and I left it at that. He never told me not to take it, or else I would have went right to my lieutenant. And if he did tell me, I didn't hear, and we're the only two in the room." (Tr. 95-96) Respondent testified that Lieutenant Bardash had not told him "in any way, shape or form" that it could be perceived as duress to take the dog from a prisoner who signed a waiver in custody. (Tr. 97)

The testimony from both Lieutenant Bardash and Respondent makes clear to this court that they did not have a good working relationship. Respondent testified, and Lieutenant Bardash did not deny, that he called Respondent worthless in front of other supervisors and that he said Respondent should resign. Lieutenant Bardash also did not deny saying that he was going to "fuck" Respondent based on this incident. Having observed Lieutenant Bardash's demeanor and tone when speaking about Respondent, it seems that he did have a certain disdain for Respondent, even prior to this incident. Respondent also clearly was unhappy with Lieutenant Bardash and felt he had been unfairly singled out and humiliated by him on previous occasions.

The issue in this case, however, is not the level of animus that had built up between these officers prior to the evening in question. At issue here is whether Respondent, having received permission from Lieutenant Harrison to take the dog from the precinct and drop it off to stay with a local family, wrongfully disregarded a subsequent order from Lieutenant Bardash not to remove the dog. Lieutenant Bardash maintains he gave Respondent that order; Respondent insists no such order was given.

To prove that Respondent committed misconduct by failing to comply with an order, the Department must establish, by a preponderance of the credible evidence, the following three elements: 1) that an order was communicated to respondent which he heard and understood; 2) that the contents of the order were clear and unambiguous; and 3) that respondent willfully refused to obey the order. *See Case No. 2016-15664* (May 18, 2016). If it is not established that a clear and unambiguous order was communicated to Respondent, it follows that there can be no finding of willful disobedience. *See Dep't of Correction v. Hipp*, OATH Index No. 337/00 (Dec. 3, 1999) (insubordination charge dismissed where petitioner failed to prove captain clearly

communicated order to subordinate and subordinate was therefore not found to have willfully disobeyed); *Dep't of Correction v. Segree*, OATH Index No. 340/02 (Apr. 11, 2002) (insubordination charge dismissed where petitioner did not prove supervisor clearly communicated demand to respondent.). Having carefully reviewed the record before the court, I am not persuaded, for the reasons set forth below, that a clear and unambiguous order was communicated to Respondent.

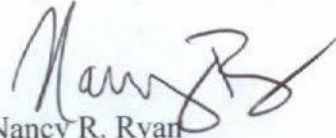
It is not controverted that Respondent and Lieutenant Bardash had some discussion about the fact that the dog was prisoner property and that Respondent said something about having a waiver. Even if the court accepts the testimony of Lieutenant Bardash that he verbalized that Respondent was not to remove the dog from the precinct, the credible evidence does not indicate that Respondent heard and understood any such order.

Based on the incredibly strained relationship between Lieutenant Bardash and Respondent, the court credits Respondent's testimony that he would have stayed away from Lieutenant Bardash as much as possible and did not initiate the conversation with him on August 16th. (Tr. 85) Given that Respondent had been disciplined by Lieutenant Bardash before and his belief that Lieutenant Bardash's goal was to make him resign, it strains credulity that if Respondent heard a direct order from Lieutenant Bardash, he would have immediately and blatantly disregarded it. This is supported by the fact that when Respondent was in his vehicle and learned that Lieutenant Bardash was angry about the dog being gone, he reversed course and immediately brought the animal back. I place great weight on this fact, which shows that Respondent's intent and inclination was to obey Lieutenant Bardash despite his belief that he had treated him poorly in the past.

As to the Department's arguments that Respondent heard Lieutenant Bardash say, "IAB won't like this," those words, though likely to give an officer pause, do not constitute a clear and unambiguous order. Lieutenant Bardash could have been referring to being upset that Lieutenant Harrison had approved Respondent's plan, or any number of other things he wanted to report to IAB. With regard to Respondent's GO-15 interview response that he "guess[ed]" Lieutenant Bardash was trying to tell him the "right thing to do," the interviewer prefaced the question by acknowledging that perhaps Lieutenant Bardash had not specifically indicated that he was giving Respondent an order. Looking at the response in context, I find no indication that Respondent reasonably believed or should have reasonably believed he had just been given an order that directly contradicted the approval he had already received from Lieutenant Harrison. Although it was communicated that Lieutenant Bardash was not happy about the decision that had been made, it was not reasonably clear that he was revoking the permission Respondent had been given by Harrison. Even if Lieutenant Bardash did explain to Respondent what he believed was the right course of action, it still does not automatically follow that he took the further step of contradicting a fellow Lieutenant's approval of Respondent's plan by ordering Respondent not to take the dog.

In sum, the record does not support a finding that a clear and unambiguous order was communicated by Lieutenant Bardash and heard and understood by Respondent. Accordingly, this tribunal cannot find that Respondent willfully failed to comply with a superior officer's order. As the Department has failed to meet its burden of proof, I find Respondent Not Guilty.

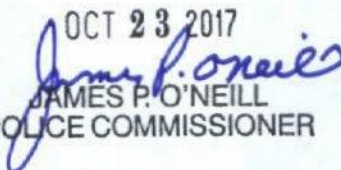
Respectfully submitted,

A handwritten signature in black ink, appearing to read "Nancy R. Ryan".

Nancy R. Ryan
Assistant Deputy Commissioner Trials

APPROVED

OCT 23 2017

A handwritten signature in blue ink, appearing to read "James P. O'Neill".
JAMES P. O'NEILL
POLICE COMMISSIONER